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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-147

BOB BULLOCK, ET AL.,

Appellants,

v.

DIANA REGESTER, ET AL.,

Appellees.

On Appeal from the United States District Court
for the Western District of Texas

BRIEF OF APPELLEES
(Joe Bernal, et al.)

STATEMENT OF THE CASE

Preface

Appellants in their brief categorize this case as "the fourth round in the judicial forum of the decade-old and seemingly unending political struggle between the State of Texas and *certain of its political groups . . .*" Brief for Appellants at 3 (emphasis added). This categorization arrogates some type of sacrosanct status to the State, some type of immutable infallibility akin to the ancient doctrine of divine right.

Joe Bernal, et al, Intervenors below and Appellees

herein, represent the Mexican-American[1] population in Texas which constitutes 20% of the State's population. They are the people of Texas—or at least a very substantial portion thereof. As a nationality or ethnic minority, they have suffered long from invidious discrimination in many facets of life and are in this case seeking the application to their situation of the equal protection guarantees of the Constitution of the United States.

The trial court most aptly summed up the present status of Mexican-Americans by stating in its opinion:

> Because of long-standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others. (A.Jur.S. 45A.)[2]

This is not to say that the Joe Bernal Appellees are not aware that the case also involves the Negro population of Texas and its desire for equal protection together with other elements of the population, including the Republican Party of Texas.

With this preface, Appellees now will set forth, as a help to this Court, the historical antecedents of this lawsuit.

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[1]In its opinion the trial court used the terms "Mexican-American" and "Chicano" interchangeably. The term "Chicano" is a shortened version or corruption of the term "Mexicano" which has often been applied to the Mexican-American in the Southwest. The term "Anglo" is generally used in the Southwest to distinguish other Caucasians from Mexican-Americans.

[2]The abbreviation "A.Jur.S." refers to the blue, separately bound Appendix to the Appellants' Jurisdictional Statement.

Historical Antecedents

A. *Article III, Section 28, Texas Constitution*

Although the Texas Constitution of 1876 required the Texas legislature to reapportion[3] after each decennial census, as of 1948 the legislature had failed since 1931 to discharge this constitutional duty. Hence, Section 28 of Article III was amended in 1948 by the people to provide that if the legislature failed to reapportion then the Legislative Redistricting Board of Texas[4] was to do so. Further, the amendment gave the Texas Supreme Court jurisdiction to mandamus the Board to perform its duty.[5]

B. *Kilgarlin v. Martin*

Kilgarlin v. Martin, 252 F.Supp. 404 (1966), *rev'd. in part, sub nom., Kilgarlin v. Hill*, 386 U.S. 120 (1967), is the next link, the *Baker v. Carr* of Texas. It resulted in an apportionment of the Texas legislature which did away with flotorial districts. It continued the use of multi-member districts for all metropolitan areas except Harris County which takes in the City of Houston and had more than one million population. To account for this distinction between the major metropolitan areas of Texas, the State explained to the federal court that in the future any county which at-

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[3]The terms "apportionment," "reapportionment," "districting" or "redistricting" are used interchangeably to refer to the overall process of dividing the State into legislative districts.

[4]This body is hereafter referred to as the "Board" and is composed of five state officials—the Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office. The amendment provides the board must assemble within 90 days after the legislature adjourns and must complete its work within 60 days thereafter.

[5]See A.Jur.S. 177E for Interpretative Commentary to Article III, Section 28, Vernon's Texas Constitution.

tained one million population or merited fifteen representatives would be subdivided into less than county wide districts. *Kilgarlin v. Martin*, 252 F.Supp. 404 at 444.

C. *The 62nd Texas Legislature*

Shortly before the May 31, 1971 adjournment of its regular session, the 62nd Texas Legislature passed a reapportionment plan for the Texas House of Representatives.[6] It cut the boundaries of 33 counties, and 43 districts contained portions of one or more counties. Eighteen counties which were too small to merit a separate representative were cut and portions of each of these counties were placed in two or more districts.

D. *Smith v. Craddick*

Immediately after passage of this House reapportionment plan, an attack was mounted on it by Republican plaintiffs in a Texas state district court. Plaintiffs claimed, and the court found on August 10, 1971, that the plan violated Article III, Section 26 of the Texas Constitution which prohibits the unnecessary cutting of county lines. (A.Jur.S. 174E - 175E.) Through a series of expedited procedures, the matter was submitted and decided by the Texas Supreme Court on September 16, 1971. (A.Jur.S. 178F.) That court held that while population is the key to apportionment, the effect of Article III, Section 26 is not completely negated and that the clear intent of that section was to provide representation apportioned on the basis of the county unit. Counties were to be combined and split only when necessary to achieve population equality. The Texas Supreme Court also held that, though the burden was on those attacking an apportionment, when it is demonstrated that a statute fails

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[6]This body is hereafter referred to as the "House."

to do what is required by the Constitution, the burden shifts to the State. The court found that since the State offered no evidence "to establish that the wholesale cutting of county lines, as provided in House Bill 783, was either required or justified to comply with the one-man, one-vote decisions," the Texas Constitution had been violated, and it declared the apportionment invalid in its entirety. (A.Jur.S. 184F.)[7]

E. *Mauzy v. The Legislative Redistricting Board*

The Board held its first meeting on August 10, 1971. It announced an intent to reapportion the Texas Senate because the legislature had failed to do so. However, on a vote of 4-1, it refused a petition to reapportion the House. It took the position that its power to reapportion existed only if the legislature did not act. Thus, if a reapportionment was passed, albeit an unconstitutional one, the Board had no power to act.

Since only a matter of days remained within which the Board could reapportion the Texas House, action was begun under the original jurisdiction of the Texas Supreme Court to mandamus the Board. On September 27, 1971, that court issued its mandamus to the Board holding:

> An apportionment which is invalid, for whatever reason, is no apportionment; and the Board's duty to proceed with apportioning the State into representative districts accrued when the regular session adjourned on May 31, 1971, without having enacted a valid apportionment statute. *Mauzy v. The Legislative Redistricting Board*, (A.Jur.S. 186F-192F.)

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[7]For an interesting commentary by a well-known Texas political analyst on this plan see BANKS, MONEY, MARBLES AND CHALK, pp. 240-242 (1971). Library of Congress Catalogue Card No. 70-180195.

In a discussion of the logistics of apportionment, the Texas Supreme Court cautioned the Board that attention must be paid to the discriminatory effect a multi-member district plan might have on the State's political or racial elements. The court said that:

> In exercising its discretion as to whether to create multi-member districts within a single county, we must assume that the Board will give careful consideration to the question of whether or not the creation of any particular multi-member district would result in discrimination by minimizing the voting strength of any political or racial elements of the voting population. See *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, at 1869, 29 L. Ed. 2d 363 (1971). (A.Jur.S. 193F-194F.)

F. *Proceedings of the Board*

When the Board held its first meeting to deal with House reapportionment, twenty-three days remained for it to act. At this first meeting, the Board elected Attorney General Crawford Martin as its chairman (Martin Dep. at 8, ll. 8-10), thus making him its legal advisor and executive officer. (Martin Dep. at 20, ll. 4-5.)

The Board held two public hearings on House redistricting. (Martin Dep. at 10, ll. 8-10.) The only issue discussed at these hearings was whether Harris, Dallas, and Bexar Counties should have multi-member districts.

The Board made no use of the plan adopted by the legislature and declared void in *Smith v. Craddick* (A.Jur.S. 178F-185F); nor of the legislative hearings which formed its basis; rather, it was treated as a "nullity." (Martin Dep. at 22, ll. 17-25; 23; 24, ll. 1-3.) The plan eventually adopted by the Board was started from "scratch." (Spellings Dep. at 25, ll.

21-25.) Except for private discussions from time to time between two or three of them, no other specific consideration was given by Board members to the task at hand. (Martin Dep. at 18, ll. 1-25; Calvert Dep. at 8, ll. 21-22; Armstrong Dep. at 7, ll. 14-24.) At no time did the Board put the question concerning the use of multi-member districts to a vote. (Martin Dep. at 45, ll. 19-23; Calvert Dep. at 61, ll. 1-6; Barnes Dep. at 97, ll. 12-25; 98, ll. 1-15.) This even though there was no unanimity of opinion since Lieutenant Governor Barnes (Barnes Dep. at 62, ll. 8-12) and Land Commissioner Armstrong (Armstrong Dep. at 23, 11. 19-20) both were publicly committed to single-member districts (Barnes Dep. at 98, ll. 16-25) while Comptroller Calvert (Calvert Dep. at 48, ll. 2-21) appeared committed to multi-member districts and Speaker Mutscher (Mutscher Dep. at 53, ll. 4-20) and Attorney General Martin were on the fence. Martin testified that he did not make up his mind on the multi-member district question until the plan adopted by the Board was presented to him by Spellings. (Martin Dep. at 30, ll. 16-25; 31, ll. 1-14.)

The Board gave little consideration to the cost of running for election in large multi-member districts; (Calvert Dep. at 55, ll. 8-19) or to the problems concerning community of interest which are presented by a multi-member district. (Calvert Dep. at 26, ll. 24-25; 27, ll. 1-7.) Nor did the Board give "careful consideration" to the effect of multi-member districts on racial or political minorities as they had been directed to do by the Texas Supreme Court in *Mauzy*. (A.Jur.S. 193F-194F; Calvert Dep. at 22, ll. 15-25; 23, ll. 1-7.)

Although three of the Board members (Barnes, Martin and Calvert) were defendants in *Kilgarlin v. Martin*, 252 F.Supp. 404 (S.D. Tex. 1966) when the State enunciated its policy of not using large multi-

member districts in a county that surpassed one million population or which was entitled to fifteen or more representatives, this policy was not applied by the Board. (Barnes Dep. at 136, ll. 1-19.)

The actual drafting of the plan adopted by the Board was done by Robert Spellings, administrative aide to Lieutenant Governor Barnes, but no instructions or guidelines were given to him by the Board as to how the plan was to be drawn. (Martin Dep. at 34, ll. 21-25; 35, ll. 1-20; Calvert Dep. at 61, ll. 1-6; Armstrong Dep. at 20, 21; Barnes Dep. at 115, ll. 15-19.) The Board just took it for granted that whatever was done would be constitutional. Commissioner Armstrong testified:

> A. I think it was the presumption of the Board that it would be done in a manner which is constitutional. I don't think anyone felt compelled to instruct; I just think that they felt like if we did it, it had to be constitutional—at least that was my feeling.
>
> Q. So actually you all just assumed that the staff would do its job and follow constitutional guidelines but you made no special effort to be sure that the staff would do that, as best you can reconstruct this thing.
>
> A. I would say that was a fair statement and a valid assumption. (Armstrong Dep. at 22, ll. 10-15; 23, ll. 8-14.)

In addition, there were no directions from the Board given to Spellings concerning whether to use single or multi-member districts for the major metropolitan areas other than Harris County. The inference from the record is that he was left to his own discretion on how to handle this important policy issue. The Board ultimately and routinely ratified the one and only plan which he submitted to them.

G. *Proceedings in this Action*

This action was one of four consolidated for trial before a three-judge federal district court. The court decided the case on January 28, 1972. It set aside as unconstitutional the entire House reapportionment plan adopted by the Board on the ground that no rational state policy was shown to justify population deviations from the one man, one vote principle. It also held that the multi-member districts in Dallas and Bexar Counties diluted or cancelled the voting strength of Negroes in Dallas County and of Mexican-Americans in Bexar County. It implemented court-approved single-member districts for those two counties and suspended statutory requirements for elections held in 1972 that require residence in a legislative district. It retained jurisdiction for purpose of implementing a court-approved House reapportionment plan in the event the 63rd Texas Legislature failed to reapportion before July 1, 1973. A stay of the trial court order sought by the State was denied with opinion by Justice Powell on February 7, 1972, 405 U.S. 1201, and elections under the court-ordered single-member districts were held in 1972 in Dallas and Bexar Counties.

SUMMARY OF ARGUMENT

The fundamental principle of equal protection requires the uniform treatment of persons standing in similar circumstances, *Reynolds v. Sims*, 377 U.S. 533 (1964). Since any restriction on the right to vote affects a "fundamental right," a State must have a "compelling state interest" to justify it, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), and such restriction must be uniformly applied. Any deviation therefrom must be thoroughly documented and applied throughout the state "in a systematic and not an *ad hoc* manner," *Kirkpatrick v. Preisler*, 394 U.S.

526 (1969).

The plan of apportionment invalidated by the three judge district court provided single-member districts for the election of members of the Texas House of Representatives from Harris (Houston) but not from Dallas, Bexar or any of the other large metropolitan counties in Texas. This unequal treatment is suspect since in *Kilgarlin v. Martin*, 252 F.Supp. 404 (1966), the State explained to the federal courts a similar distinction between Harris and Dallas Counties by reference to a state policy which provided that when a county reached one million population or merited fifteen or more representatives then it would no longer be treated as one large multi-member district. While in 1966 Dallas was somewhat short of a million population, according to 1970 census figures its population is now more than 1.3 million, and it merits 18 representatives. In the plan in question, the State, without explanation, abandoned this formerly enunciated official policy. This belies the fact that the State had a rational policy, let alone a compelling interest, to distinguish between any of the major metropolitan areas in Texas.

The plan declared invalid by the trial court also cut the boundaries of nineteen counties in violation of Article III, Section 26 of the Texas Constitution. The State explained that in some instances county lines had to be cut to give effect to the Equal Protection Clause of the United States Constitution. However, these counties were cut in irrational, inconsistent and sometimes totally unnecessary manners and, as the trial court found, the State attempted to explain only one of these instances. Eight of the counties cut involved multi-member districts with only three such districts remaining as entire counties. In four instances parts of one county were divided between more than two legislative districts. Bexar County, in particular, was split without

necessity and a portion was attached to a rural district which resulted in raising the average deviation in the plan.

When the circumstances of specific cases demonstrate that multi-member districts "operate to cancel out the voting strength of racial or political elements of the voting population," they will be found unconstitutional. *Whitcomb v. Chavis*, 403 U.S. 124 (1971). This "tendency" in multi-member districts to so affect minority voters is especially pronounced in "large" districts which elect a "substantial proportion of either house of a bicameral legislature" and where there is no requirement that the candidates run from "particular sub-districts." *Whitcomb*, 403 U.S. 124 (1971).

The Texas Legislative Redistricting Board was mandamused by the Texas Supreme Court to redistrict for House purposes. In so doing, the Court warned that "careful consideration" should be given to the effect of the use of multi-member districts on the "political or racial elements of the voting population." *Mauzy v. Legislative Redistricting Bd.* (A.Jur.S. 193F-194F).

The Board ignored the red flag waved before it by the Texas Supreme Court and gave no consideration to such effect. The trial court found that Mexican-Americans in Bexar County and Negroes in Dallas County historically had been and continue to be disadvantaged by a concomittance of racism, poverty and discrimination. These circumstances, coupled with the use of a majority place system in the Texas electoral scheme, in contrast to the plurality system used in Indiana, compelled the trial court to find and conclude that the use of large, multi-member legislative districts in the plan in question diluted and cancelled out the voting strength of the Negro and Mexican-American miorities in Dallas and Bexar Counties. *Whitcomb v.*

Chavis, 403 U.S. 124 (1971); *Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala. 1972); *Taylor v. McKeithen*, 407 U.S. 191 (1972).

The plan contains at least a 9.9% top to bottom population deviation. This deviation is not the result of a good faith effort to obtain population equality. The State attempts to avoid the requirement of equal protection by arguing that this Court should adopt 9.9% as a "*de minimus*" deviation.

Any specific definition of "*de minimus*" deviation would result in a redistricting authority aiming at "*de minimus*" rather than "absolute population equality." *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964).

In any case, Appellees contend that actually the total deviation in the State's plan is correctly computed to be at 29.3% instead of 9.9%. The 9.9% deviation, as noted by the trial court, results from the State's method of working out a deviation in its large multi-member districts corresponding to the method of handling flotorial districts invalidated in *Kilgarlin v. Martin* 252 F.Supp. 404 (1966) (A.Jur.S. 13A n. 5). The 29.3% total deviation, as correctly computed, is an impermissibly large deviation and is clearly unconstitutional.

ARGUMENT

I.

THE BOARD PLAN IS NOT BASED ON A RATIONAL, CONSISTENT STATE POLICY THAT EXPLAINS THE DISPARATE TREATMENT ACCORDED MAJOR METROPOLITAN AREAS, THE IRRATIONAL AND INCONSISTENT TREATMENT OF OTHER AREAS AND THE DEVIATIONS FROM ONE MAN, ONE VOTE.

A. *Board Fails To Set A Rational Policy*

When the Texas legislature in 1971 ignored its constitutional duty by failing to redistrict the Texas Senate and by adopting an unconstitutional House redistricting plan, the redistricting task fell upon the Board. (A.Jur.S. 9A.) After its initial refusal to reapportion the House was cured by mandamus from the Texas Supreme Court, the Board had twenty-three days in which to act.

The Board, for whatever reason, abdicated its responsibility of drafting a House redistricting plan to Robert Spellings, administrative assistant to Lieutenant Governor Ben Barnes, who testified by deposition that with guidance from Barnes he drafted the House plan *in toto* in less than one day. (Spellings Dep. at 26, ll. 5-21.)

The Board held only two public sessions to consider House redistricting. Barnes was absent from one meeting and House Speaker Gus Mutscher arrived very late for the other. (Calvert Dep. at 15, ll. 16-23.) The Board never made policy decisions or furnished Spellings with guidelines which he was to follow. He was merely instructed to "draw a constitutional plan." Most important is the fact that the depositions of the five members of the Board show that they totally failed to determine, policywise, to what extent multi-member House districts were to be employed in the larger counties even though the Texas Supreme Court in *Mauzy v. Legislative Redistricting Bd.* (A.Jur.S. 186F-194F) expressly admonished that:

> In exercising its discretion as to whether to create multi-member districts within a single county, we must assume that the Board will give careful consideration to the question of whether or not the creation of any particular multi-member district would result in discrimination by minimizing the

voting strength of any political or racial elements of the voting population. (A.Jur.S. 193F-194F.)

The trial court, on this point, concluded:

> As an example of what we must conclude to be considerable lack of rational direction, at no point in its deliberations did the Board ever debate or discuss the general issue of single-member districts, obviously a very important issue in any apportionment plan, and particularly in the Texas proposal. (A.Jur.S. 20A.)

Even the most perfunctory reading of the record indicates that the Board was hardly involved in the reapportionment. It held two public hearings on short notice. But there was no relationship between these hearings and the plan actually adopted. For example, Attorney General Crawford Martin, who was the swing man on the multi-member district question, testified that his decision to support the use of multi-member districts was not made until Spellings presented him with the plan. (Martin Dep. at 30, l. 25; 31, ll. 1-14.) In other words, the plan which was adopted by the Board was already in existence before Martin made up his mind.

What happened was that at the eleventh hour Spellings presented the Board with only one plan. It included multi-member districts for all of the major metropolitan areas except Harris County which was broken into single-member districts. Due to the time element, the Board had no choice but to accept the plan or be in contempt of the mandamus of the Texas Supreme Court. Thus, the basic issue involving use of multi-member districts was really determined by Spellings.

In the light of this behavior of the Board, it is not surprising that the trial court stated:

> We have serious doubts whether this Board did

the sort of deliberative job contemplated by *Reynolds* as worthy of judicial abstinence. (A.Jur.S. 21A.)

The Board not only failed to set a rational policy for the use of multi-member districts, but it, whether by design or otherwise, abandoned without explanation the only policy advanced as rational by the State in prior litigation. In this connection, after noting that two[6] of the Board members were defendants in *Kilgarlin v. Martin*, 252 F.Supp. 404 (1966), *rev'd. in part, sub nom., Kilgarlin v. Hill*, 386 U.S. 120 (1967), the trial court in its *per curiam* opinion stated:

> In *Kilgarlin* the three-judge court was assured by the defendants that the State's policy "limits the size of any multi-member district to fifteen Representatives" and that any county that attained a million or more residents in the future would be subdivided for Representative districts. In their trial brief the State asserted that the explanation for the differing treatment of Dallas and Harris Counties was that whenever a county attained a million residents or was allocated fifteen legislators it would no longer be left as an at-large district. The district court in *Kilgarlin* approved the disparate treatment between Dallas and Harris Counties in the 1965 apportionment bill in reliance upon the State's representation that different treatment would be accorded a county once it attained a million population. Dallas County now has a population of well over one million, a greater population than Harris had in 1960. This earlier "policy" of the State of Texas was called to the attention of the redistricting board during its pub-

[6]The trial court mistakenly believed that only two Board members were defendants in *Kilgarlin*. Actually, Barnes as Speaker of the House, Martin as Secretary of State and Calvert as Comptroller were defendants. In addition Mutscher, though not a defendant, was Chairman of the House Redistricting Committee which drafted the plan before the Court in *Kilgarlin*.

lic hearings but was apparently ignored. The board's unexplained abandonment of an existing state policy belies the presence of any rational state policy. (A.Jur.S. 20A-21A.)

It is noteworthy that Barnes, who was a defendant in *Kilgarlin*, in his deposition professed ignorance of the previously enunciated State policy in question. Furthermore, he testified that Martin failed to advise him or the Board on this matter.[9]

B. *Irrational and Inconsistent Treatment of Specific Areas*

The basis for reapportionment litigation is the Fourteenth Amendment right of citizens "to an effective vote within the general constructs of what is essentialy a majoritarian system of representative government" together with "the First Amendment right to associate politically whether in majority or minority." (A.Jur.S. 25A-26A.) "The concept of equal pro-

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[9]Barnes testified: (Barnes Dep. at 136, ll. 1-19.)

Q. You don't know that the state has ever taken the position that once a county reaches, say, a million population, that it is at that point where that county should be divided?

A. No, I don't think they have taken that position. If they have taken it, it has been without my knowledge.

Q. The Attorney General did not advise you along those lines?

A. Are you telling me that the Attorney General of Texas in the past has taken the position that when a county reaches a million population, it must be divided?

Q. No, no, I am just simply asking you whether he ever advised you of that.

A. No, he did not advise.

Q. Do you recall whether Speaker Mutscher brought this up in any way?

A. No.

tection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds v. Sims*, 377 U.S. 533, 565 84 S. Ct. 1362, 1383 (1964). A restriction on the franchise, such as is presented in a reapportionment case, affects a basic fundamental right. Therefore, the State is required to justify any disparate treatment by a showing of a "compelling state interest." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966); *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 806, 807, 89 S. Ct. 1404, 1407 (1969).

In considering "compelling state interest" and the rational application of state policies, it is important to distinguished between matters which formed the basis for a decision and matters which are simply after-the-fact justifications contrived to explain illogical inconsistencies. For just as certainly as the equal protection clause of the Constitution forbids a plan which is violative of official state policy, it interdicts a scheme which reflects "no policy, but simply arbitrary and capricious action." *Baker v. Carr*, 369 U.S. 186, 226, 82 S. Ct. 691, 715 (1962). Thus, Mr. Justice Stewart concurring in *Davis v. Mann*, 377 U.S. 678, 694, 84 S. Ct. 1441, 1449 (1964), stated that "to the extent that a State's legislative apportionment plan is conclusively shown to have no rational basis, such a plan violates the equal protection clause."

By the same token, if a rationale exists for a deviation from an official State policy, then it "must be thoroughly documented and applied throughout the State in a systematic, and not an *ad hoc* manner." *Kirkpatrick v. Preisler*, 394 U.S. 526, 535, 89 S. Ct. 1225, 1231 (1969). Without this requirement of well thought out and evenhanded application of standards

for deviation from State policy, the floodgates of "subterfuge" would be opened. *Kirkpatrick, Ibid.*

1. *Houston v. Dallas*

Distinguishing between the largest major metropolitan areas in Texas is the most obvious and questionable facet of the Board's House plan. As already stated, in *Kilgarlin*, a similar distinction in a former Texas reapportionment plan was attacked as a denial of equal protection and was defended on the ground that a county would get single-member districts on reaching a given size. In reliance on this "official state policy," the federal courts in *Kilgarlin* allowed the disparate treatment of Dallas and Harris County residents.

According to the 1970 census, Dallas County has a population of over 1.3 million persons and, thus, merits eighteen state representatives. It clearly comes within the *Kilgarlin* explanation. Nevertheless, for no enunciated reason, let alone a rational one, the Board chose to abandon this official state policy and leave Dallas County as a multi-member district. This is a prime example of the fact that no consideration was given to previous state policy—a policy that was proffered as a basis for federal court decision in previous redistricting litigation in which three of the five present Board members were defendants.

When faced with such an unequal treatment of almost identical metropolitan areas, other courts have likewise found the districting plans to be invalid. For example, in the highly analogous case of *Drew v. Scranton*, 229 F. Supp. 310 (M.D. Pa. 1964), *vacated and remanded on other grounds*, 379 U.S. 40, 85 S. Ct. 207 (1964), a federal district court struck a plan which contained a curious pattern of representative districts in the larger counties. As that court expressed itself:

> Defendants have offered no explanation for thus dividing 14 of the larger counties entirely into single-member districts while at the same time dividing the 15 other larger counties, many of them adjoining the single-member district counties, into a crazy quilt of 1, 2, 3 & 4 member districts. . . . In the absence of any legislative history or other explanation justifying it and we have found none, we can only conclude that this districting is either the result of gerrymandering for partisan advantage . . . or that it is wholly arbitrary and capricious. The plaintiffs' contention is that thus providing a haphazard arrangement of 2, 3 & 4 member districts alongside of single-member districts violates the basic principle of one man, one vote, which is, as we have seen, implicit in the constitutional sense of equal protection of laws in this field. We are constrained to agree with this contention. 229 F. Supp. at 326.

See *Butcher v. Bloom*, 415 Pa. 438, 203 A2d 556 (1964) and *Kruidenier v. McCulloch*, 142 N.W.2d 355 (Iowa, 1966).

2. *Violations of County Lines*

Article III, Section 26, of the Texas Constitution is the foundation for the official state policy of preserving county lines in legislative districting. It is only where there is an excess of population in one county that it may be split and the balance of that county joined to another county or counties to achieve the additional representation which is required by the population. The Texas Constitution thus forbids wholesale fracturing of county lines except when it is absolutely necessary to obtain population equality. The brief filed on behalf of the State indicates that "the predominant goal of the Board was substantial population equality, with *de minimus* deviations to preserve county lines." Brief for Appellant at 19. The record in this case, however, when read in light of the plan eventually

adopted by the Board indicates that little consideration, if any, was given to this constitutional policy. If the preservation of county lines was a goal and not an after-the-fact justification, then it is hard to understand the treatment of several counties.

Adjusting the constitutional imperative of Article III, Section 26 of the Texas Constitution to the equal protection clause of the Fourteenth Amendment was a serious but far from impossible task. There was no question that in some instances county lines would have to be violated. Therefore, great need existed for some directions or guidelines to govern these situations. Yet, as already shown, the Board failed to provide any.

The trial court was faced with a number of clear cut violations of the Texas Constitution which it discusses in its opinion. (A.Jur.S. 15A-24A.) Nevertheless, the State continues to take the position that it is not required to explain a thing. Each of the examples examined in the following sections of this brief represents an irrational and repeatedly inconsistent approach to apportionment which belies the fact that there is a rational basis behind the plan. *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S. Ct. 1225 (1969).

3. *Bexar County*

According to the 1970 U. S. census, Bexar County has a population of 830,460 people which entitles it to eleven representatives with a small excess deviation of 1.1% computed according to the figures used by the State. However, for no enunciated reason, let alone a rational one, the Board ignored the mandate of the Texas Constitution to preserve county lines. Bexar County was split and four census tracts were taken from the northwest quadrant of the county and attached to a contiguous but curiously shaped district

identified as District 45. Without the Bexar County spillover, the six counties in District 45 would have had a population of 74,328. This would have been just 317 persons short of the ideal district of 74,645 and would have involved a deviation of less than one-half of one per cent. This unexplained fracturing of Bexar County resulted in raising the population of District 45 from 74,328 to 78,090 and created an excess deviation of 4.6%. Indeed, if Bexar County had been left whole, it would have had only a 1.1% excess deviation computed according to the State's figures which would have been less than the 1.2% deviation in Dallas County where the Board plan did not cut county lines.

The Bexar County situation is an excellent example of an instance where, without large deviation, a county can be left intact. Due service could thus be done to the Texas Constitution and the Equal Protection Clause of the United States Constitution.

4. *El Paso County*

Another curious example of a needless violation of county lines occurs in El Paso County where the County was divided and a portion excised and added to several rural counties. Had this county been left as a multi-member district, it would have had a total population of 359,291 persons and would have been entitled to five representatives. Such treatment would have left the county intact and included an average deviation of 3.7%, which is well within the total range of the Board's plan. However, for a once again unexplained reason, the Board ignored county lines and excised a portion with 61,521 population and attached it to several rural West Texas counties. This is especially irrational since 58,587 of those cut out and added to the rural West Texas counties were citizens of the City of El Paso while 34,096 rural residents of El Paso County

were included in the multi-member district with the balance of the City of El Paso. If for some reason El Paso County needed to be split, then some rationale should have been used to determine what areas should be poured into the pot with the rural counties. Of course, the answer is clear, under the deviations which the Board accepted, El Paso did not need to be split.

5. *Hidalgo County and Lubbock Counties*

When the Texas Supreme Court, in *Smith v. Craddick* (A.Jur.S. 178A-185A), declared unconstitutional the House plan adopted by the 62nd Texas Legislature, that court took great pains to explain to the Board how the counties were to be split if that became necessary:

> 4. With the nullification of the dictate relative to use of the surplus population (less than enough for a district) of a county which already has one or more representatives allocated thereto, it becomes permissible to join a portion of that county (in which the surplus population reside and which is not included in another district within that county) with contiguous area of another county to form a district. For example, if a county has 100,000 population, and if a district of 75,000 population is formed wholly within that county, the *county* is given its district, and the area wherein the 25,000 live may be joined to a contiguous area. (A.Jur.S. 183F.)

This constitutional proviso requires that if a county must be split, the excess must be attached to an adjoining legislative district and not spread out among two or more legislative districts. There should have been no question as to this procedure since it is the way in which the legislature handled reapportionment in 1967. (A.Jur.S. 16A.) Furthermore, it is clear that the Texas Constitution intended to preserve some integrity to the power of persons living within a county. Thus, when the Board adopted a plan which in "four

separate instances has split the surplus (the population greater than that allocable to a whole number of representatives) between two adjoining districts" (A.Jur.S. 16A) some serious questions about violation of policy are again raised. As the trial court observed, "The State has ventured no explanation whatsoever even of the necessity for these depredations of State policy." (A.Jur.S. 16A.)

Of special note, however, is the differing way in which Hidalgo (population 181,535) and Lubbock (population 179,295) Counties were handled. Since the populations of these two counties are almost exactly the same, one would expect that they would be treated the same. As usual, nothing could be farther from the truth.

Since each county would, by population, be entitled to 2½ representatives, it was necessary to split these counties, one of those instances described in *Smith v. Craddick* (A.Jur.S. 178F-185F) when the Texas Constitution must give way to the Equal Protection Clause of the United States Constitution. The Board split 31,573 persons from Lubbock County and attached them to the more rural Hale and Swisher Counties to create District 76 with a population deviation of 1.9%.

In the case of Hidalgo County, the Board also created a less than county wide multi-member district. This one, District 59, consisted of 144,995 persons and had a population deviation of 2.9%. However, Hidalgo County's 36,540 excess population (which is about one half of a district) was split between two other adjoining districts. District 49 received 26,840 of this surplus and District 51 got the remaining 9,700. District 49 is a large, Gulf Coast district composed of three rural counties and includes the legendary and vast King Ranch. Hidalgo County is a landlocked, metro-

politan Rio Grande River county. Thus, by splitting Hidalgo County as it did, the Board diminished the effectiveness of the residents of Hidalgo County in influencing the third legislative seat to which they are partially entitled. No explanation for this irrationally differing treatment of Lubbock and Hidalgo County has been offered.

A less obvious, but equally questionable, irrationality should also be noted in the Board's treatment of Lubbock County. The City of Lubbock, population 149,101, was split. A total of 11,543 residents of the City of Lubbock were thrown in with two adjoining rural counties to make up District 76 while an almost equal number of persons from rural Lubbock County were included with the rest of the City of Lubbock to compose the Lubbock County multi-member district.

The City of Lubbock's population of 149,101would merit almost exactly two representatives. This would have resulted in an average population, according to the State's theory of deviation, of 74,550 persons or a minimal deviation of 0.12%. Likewise, if the entire balance of 30,194 population of Lubbock County was attached to Hale and Swisher Counties, the total population for District 76 would have been 74,700, which would once again result in a minimal deviation of 55 persons or 0.07%.

There is no rationale to the splitting up of the City of Lubbock when a further comparison is made to the way in which the Board plan handled Potter County (Amarillo) in which an entire metropolitan district was formed out of the City of Amarillo (District 67) before including the remainder of that city with rural Potter County and Randal and Carson Counties to create District 65.

Lubbock County thus is a prime example of a situa-

tion where, if rational guide lines or standards had existed, the resultant deviation would have been much more acceptable.[10]

6. *Jefferson County*

Jefferson County is another example of an unexplained situation where a multi-member district (here District 7) was created and the excess was diverted into two seperate adjoining counties. Once again, no rational explanation was offered for this violation. However, the Jefferson County situation is especially significant since the scheme makes use of block groups rather than census tracts. When a plan ceases to use census tracts or enumeration districts and begins to operate with block group data, then much more basic building blocks become available and a considerably lower deviation should be required.[11] For example, Block 4 of Census Tract 3 in Jefferson County has a population of 12 while Block 7 of that same tract has a population of 34. When this is compared to the total population of Census Tract 3, which is 15,885, it becomes obvious that the tools are available to draw an almost perfect plan.

One could go on *ad nauseum* cataloging the violations of state policy which the trial court examined and found completely lacking in rationality and which re-

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[10]If there is any theoretical reason behind the use of multi-member districts, it must be to preserve the integrity of political subdivisions. In the Board plan, only three of the eleven multi-member districts preserve county integrity.

[11]Census tracts are small relatively permanent areas into which large cities and adjacent areas are divided for the purpose of providing comparable small area statistics. The tracts are intended to be homogenous reflecting similar population characteristics such as economic status and living conditions. Census Blocks are subdivisions of census tracts which in many instances conform with a single city block. Enumeration districts serve the same function in rural areas as census tracts do in the more urban areas.

mained totally unexplained before said court. (A.Jur. S. 16A.) In fact the district court found that the Board plan cut the boundaries of 19 counties without any explanation of a rational and consistent state policy for so doing at the expense of substantial population deviation. (A.Jur.S. 16A.) With the exception of one small East Texas County, Bowie, no explanation was even proffered to the trial court or to this Court as to the cutting of these counties. Thus, when the State argues in its brief that the plan adopted by the Board contains "only one fully-explained departure from the mandate of the state constitution" (Brief for Appellants at 4) it means just that—one departure for which explanation is offered, leaving 18 other departures which were pointed out to the State by the trial court (A.Jur.S. 15A-18A) and which still remain unexplained.

II.

MULTI-MEMBER DISTRICTS OPERATE TO MINIMIZE OR CANCEL OUT THE VOTING STRENGTH OF RACIAL ELEMENTS IN DALLAS AND BEXAR COUNTIES

A. *The Constitutional Standard*

Although a multi-member district is not, per se, unconstitutional, *Fortson v. Dorsey*, 379 U.S. 433, 85 S. Ct. 498 (1965); *Burns v. Richardson*, 384 U.S. 73, 86 S. Ct. 1286 (1966), within the "circumstances of a particular case [it] may operate to minimize or cancel out the voting strength of racial or political elements of the voting population," *Whitcomb v. Chavis*, 403 U.S. 124, 143, 91 S. Ct. 1858, 1869 (1971). This "tendency" of multi-member districts to adversely affect the franchise of minorities is especially pronounced in

"large" districts which elect a "substantial proportion of either house of a bicameral legislature" or where there is no requirement that the candidates run from "particular sub-districts." *Whitcomb*, 403 U.S. 124, 143, 91 S. Ct. 1858, 1869 (1971).

When the Texas Supreme Court handed down its decision in *Mauzy v. Legislative Redistricting Bd.*, (A.Jur.S. 186F-194F), it recognized that multi-member districts are "justiciable" and tend to minimize or cancel out the voting strength of minorities. That court undoubtedly was aware that Dallas County (population 1,327,321) and Bexar County (population 830,-460) were the type of large districts referred to in *Whitcomb*; that together their representatives comprised approximately 20% of the membership of the Texas House; and that Texas law does not require a candidate for the Texas House from a multi-member district to reside within a geographic sub-district. Thus, it is not surprising that the Texas Supreme Court relied on *Whitcomb* for its *caveat* to the Board to "give careful consideration to the question of whether or not the creation of any particular multi-member district would result in discrimination by minimizing the voting strength of any political or racial elements of the voting population." (A.Jur.S. 193F-194F.) The Texas Supreme Court could not have red-flagged more forcefully the matter to the Board.

What is surprising is that the record, replete with candid admissions in the depositions of the Board members and key staff aides, demonstrates that literally no consideration was given to this important area.[12]. Indeed, Commissioner Armstrong sums mat-

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[12]Calvert testified: (Calvert Dep. at 23, l. 25, p. 24, ll. 1-6.)
Q. In other words, would it be fair to say that you completely ignored in your decisions the racial, whether it

ters up when he attempts to explain why he felt it was not necessary to give the staff any guidelines concern-

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be Negro or Latin American, and ethnic and political interest of various minorities?

A. Yes, I tried to ignore it because I don't think that it had a place in this. My interest was in doing what the mass of the people wanted and I think that we accomplished it.

Armstrong testified: (Armstrong Dep. at 20, ll. 19-24; 21, ll. 1-7.)

Q. Were you as a Board member, apprised by the Attorney General or anybody else as to the case law relating to minorities when it comes to issues of redistricting? I specifically have in mind the constitutional guidelines that redistricting plans must not be drawn in such a way as to not minimize or dilute or cancel out the voting strength of minorities and significant political elements?

A. I am not sure whether I was ever advised of that or whether I read that case, but I was aware personally that that was the law.

Q. Do you know whether the staff was instructed along those—along that line there on that constitutional requirement?

A. My only answer there would be that I didn't do it and I do not recall that the Board did.

Robert Johnson, Executive Director of the Texas Legislative Council, who gave Spellings help in preparing the plan adopted by the Board, testified by deposition: (Johnson Dep. at 39-40, ll. 2-7.)

Q. Yes, but to what extent did you consider the minority groups in drafting the plan?

A. I didn't consider them top side or bottom.

Q. And you didn't receive any instructions from the Board to do that, either did you?

A. No sir.

Greg Hooser, a staff assistant who worked with Spellings and who attended the meetings of the Board, testified in deposition: (Hooser Dep. at 48, ll. 3-10.)

Q. But you made no specific inquiry as to how this plan was going to affect the Blacks, did you?

A. No sir.

Q. You gathered no data relating to how the proposed plans for the House were going to affect the Blacks?

A. No sir, not that I can recall.

Q. And, you were not asked to provide data by the Board or any member of the Board, were you?

A. No sir, not that I can recall.

ing dilution or minimization of minority voting strength:

> I think it was the presumption of the Board that it would be done in a manner which is constitutional. I don't think that anybody felt compelled to instruct; I just think that they felt like if we did it, it had to be constitutional—at least that was my feeling. (Armstrong Dep. at 22, ll. 10-15.)

The result of course was that both the Board and the staff ignored the judicial red flag.

The three-judge federal district court which heard this case, on the other hand, took great pains to examine the use of multi-member districts in Dallas and Bexar Counties in the light of *Whitcomb, supra*, and of the circumstances affecting the Negro and Mexican-American populations, including the historic Texas patterns of racial and ethnic segregation and other invidious forms of discrimination as well as the restrictive aspects, past and present, of the state election laws. Three and one-half days were spent listening to live testimony and well over a thousand pages of depositions were received into evidence together with hundreds of exhibits documenting these Texas patterns. Throughout the entire trial the State maintained, much like Commissioner Armstrong, that it had no burden to explain anything other than that the Board had sought to maintain county integrity.

B. *Condition of Mexican-Americans in Texas and Bexar County*

The major emphasis of this portion of Appellees brief will center on the effect of a multi-member district on the minority residents of Bexar County, Texas, who are primarily Mexican-American.[13] Filed con-

[13]The Mexican-American population in Bexar County according to the 1970 census is 376,027 or 45.28% of the county

currently with this brief is a brief on behalf of Diana Regester, *et al.*, the original plaintiffs, which will address itself to the effect of the multi-member district on the Negro population of Dallas County.[14]

In many ways the problems of the Negroes and the Mexican-Americans are the same.[15] The 220,512 Negroes of Dallas County constitute 17% of the coun-

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population while the Negro population is 56,394 or 6.79%. In Dallas County, on the other hand, the Mexican-American population is only 88,651 or 6.68% while the Negro population is 220,512 or 16.61% of the county population. Thus, each minority has substantial population in the county where the other minority predominates.

[14]Because of the time element, evidence was offered only as to the Dallas and Bexar County multi-member districts. The trial court in its opinion notes: (A.Jur.S. 24A-25A, n. 7.)

> Attorneys for the plaintiffs in the cases originally filed in the Eastern, Northern, and Western Districts indicated to the court that, because of the inherent time limitations incident to these actions, they would have difficulty in fully developing the evidence relating to their claims regarding multi-member districts other than Dallas and Bexar, and that therefore they would confine their evidence to the situations obtaining in those two counties. In response to this situation the Assistant Attorney General, representing the State at the preliminary pre-trial conference on December 22, 1971, observed:
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> > "This is my personal view entirely, but I would think that the Plaintiffs' case can either be made or not be made in two or three of the major metropolitan areas, and I would anticipate, at least, that if the multi-member districting were knocked out, say in Dallas and Tarrant County and Bexar County, that probably it would not be used elsewhere either, so that I have some difficulty personally in seeing the necessity of trying these issues as to eleven different metropolitan areas."

[15]Appellees, at trial, introduced testimony relating to the Mexican-American population in Dallas County. However, for the sake of brevity, no detailed discussions will be made in this brief of the conditions of Mexican-Americans in said County which are similar to those of Mexican-Americans in Texas and in Bexar County as well as to those of the Negro. For example, until recently there were only nine Mexican-American policemen in Dallas; only one fireman at time of trial; and only five Mexican-Americans have served on grand juries in the last 80 years. (Record at 723-746.)

ty population and 25% of the city population. They live in Negro neighborhoods which are clearly defined in terms of poverty, high dependence on public welfare and other adverse factors. They are the product of a society that was rigidly segregated by state and local laws and customs. (A.Jur.S. 38A-39A.)

The Mexican-Americans in Bexar County, like the Dallas County Negroes, constitute a large minority. Of the 830,460 residents of Bexar County, over 376,000 are Mexican-American.[16] They, like the Negroes in Dallas, live in clearly defined Mexican-American neighborhoods, also known as *Barrios*, which have shocking conditions in terms of low incomes, inferior educational opportunity, poverty and high levels of unemployment. (Record at 524-527.) Although Texas has never had laws which overtly discriminated against the Mexican-American, this minority has suffered just as much segregation and other forms of discrimination by the application of laws as the Negroes have by the existence of laws. *Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667 (1954).

> When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based upon some reasonable classification, the guarantees of the Constitu-

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[16]The State in its brief argues that Mexican-Americans in Bexar County constitute a majority or at least a plurality. Actually, in the County, they constitute approximately 45% (Anglos constitute 47%, Negroes 7% and all others 1%) and only in the City of San Antonio, in which within its geographical boundary exist a number of separately incorporated and predominantly Anglo populated communities, do Mexican-Americans constitute 52% of the population. Thus, it is clear that Mexican-Americans are neither a majority nor a plurality in Bexar County. But even if they were, as the trial court's opinion notes, the term "minority" in the context of the Constitution's guarantee of equal protection does not have a mere numerical denotation. (A.Jur.S. 49A, 54A.)

tion have been violated. The Fourteenth Amendment is not directed solely against discrimination due to "two class" theory—that is, based upon differences between "White" and "Negro." *Hernandez v. Texas*, 347 U.S. 475 at 478, 74 S. Ct. 667 (1954).

The trial court's opinion finds that "because of long standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others." (A.Jur.S. 45A.)"

"Specifically there has been substantial federal and state court litigation dealing with a number of these areas as they relate to Mexican-Americans. Some of these cases are:

Hernandez v. State of Texas, 347 U.S. 475, 74 S. Ct. 667 (1954). This Court found systematic exclusion of Mexican-Americans as a class from jury duty in Jackson County, Texas.

Munis v. Beto, 434 F.2d 697 (5th Cir. 1970). Discrimination was found in the selection of El Paso County grand juries.

Rodriguez v. Brown, 437 F.2d 34 (5th Cir. 1971). This case resulted in legislation which abolished the freeholding requirement for grand jury commissioners and grand jurors.

Puente v. Crystal City, Civil Action No. DR-70-CA-4 (W.D. Tex. April 8, 1970) (Unreported). A freeholder requirement for city office in Crystal City which discriminated against Mexican-Americans was held unconstitutional.

Juarez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925). Requirement that grand juries contain no members of Roman Catholic faith found to violate the equal protection clause of the Fourteenth Amendment to the U. S. Constitution.

Rodriguez v. Smith, Civil Action No. 70-C-235 (S.D. Tex. 1971) (Unreported). Case resulted in legislation which abolished the use of property tax rolls in filling jury wheels and substituted registered voter lists.

Garza, et al v. Smith, 320 F. Supp. 131 (W.D. Tex. 1971), *vacated and remanded on other grounds*, 401 U.S. 1006, 91 S.

The evidence before the court showed that in Texas the median family income for Mexican-Americans was only 57% of that of the Anglo-American (Exhibit BI-

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Ct. 1251 (1971), 450 F.2d 790 (5th Cir. 1971). The court held that Texas statute which allowed assistance to physically disabled or blind voters but forbade similar assistance to illiterate voters constituted a violation of equal protection.

Beare v. Smith, 321 F. Supp. 1100 (S.D. Tex. 1971). Resulted in legislation now in effect, pending appeal, which did away with the annual voter registration requirement and instituted a permanent voter registration system.

Independent School District v. Salvatierra, 33 S.W.2d 790 (Tex. Civ. App.—San Antonio), *cert. denied* 284 U.S. 580 (1931). Upheld a Texas practice of segregating Mexican-Americans on the basis of English language difficulty.

Delgado v. Bastrop Ind. School Dist., Civil Action No. 388 (W.D. Tex. June 15, 1948) (Unreported). Found unconstitutional segregation of Mexican-American children by means of grouping according to alleged language deficiencies.

Hernandez v. Driscoll Consol. Ind. School Dist., 2 Race Rel. L. Rept. 329 (S.D. Tex. 1957). Found an abuse of classification according to language deficiency to be "unreasonable race discrimination" Id. at 331-32.

Chapa v. Odem Ind. School Dist., Civil Action No. 66-C-92 (S.D. Tex. July 28, 1967) (Unreported). Enjoined a school district from maintaining a separate school for Mexican-American children.

Cisneros v. Corpus Christi Ind. School Dist., 324 F. Supp. 599 (S.D. Tex. 1970), *aff'd*, 467 F.2d 142 (5th Cir. 1972). Found Mexican-American children to have been segregated by school Board policy.

Perez v. Sonora Ind. School Dist., Civil Action No. 6-224 (N.D. Tex. Nov. 5, 1970) (Unreported). Resulted in a closing of "The Mexican School," and the establishment of a unitary school system in Sonora, Texas.

United States v. Texas Educ. Agency, (Austin Independent School District) 467 F.2d 848 (5th Cir. 1972). Found Mexican school children to have been segregated as a result of school board action.

United States v. Texas, (Del Rio San Felipe Ind. School Dist.) Civil Action No. 5281 (E.D. Tex. Dec. 6, 1971). Found discrimination in educational opportunities offered Mexican-American students in Del Rio, Texas.

Rodriguez v. San Antonio Ind. School Dist., 337 F. Supp. 280 (W.D. Tex. 1971), *prob. juris. noted* ..... U.S. ....., 92 S. Ct. 2418, *argued* October 12, 1972. Found discrimination in the Texas system of school financing. Involves Bexar County school district.

17-143 at 22-23) and that Mexican-Americans tended to be primarily unskilled laborers.[18] The evidence further demonstrated that in 1966 the employment practices of major employers in the largest metropolitan areas of Texas resulted in the fact that persons with Spanish surname were employed in "a disproportionately small number of well paying jobs."[19] (Exhibit BI-17-143 at 23.) In 1965 it was estimated that Mexican-Americans constituted 95% of the estimated 167,000 migrant farm workers in Texas. (Exhibit BI-17-143 at 23-24.) Furthermore, even in the areas of civil service, Mexican-Americans were concentrated in the lower paying jobs.[20]

This state wide problem with income and employment was especially true in the *Barrio* section of the City of San Antonio.[21] This area, well known through-

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[18]In Texas only 24 per cent of Mexican-American males were in the professional, technical, managerial or craft occupations compared to 45 per cent of the Anglos. One-fourth of the females over the age of 14 were reported employed and approximately one-third of this number were in the white-collar fields as compared with two thirds of the employed Anglo females in those areas. (Exhibit BI-17-143 at 23.) *Hearings before the United States Commission on Civil Rights*, San Antonio, Texas, December 9-14, 1968.

[19]One example presented to the United States Commission on Civil Rights indicated that in the garment industry Mexican-Americans constitute more than 80% of the work force but held only 42% of the white-collar jobs as opposed to the fact that while Anglos comprised only 15% of the work force, they held 57% of the white-collar jobs. (Exhibit BI-17-143, at 23.) *Hearings before the United States Commission on Civil Rights*, San Antonio, Texas, December 9-14, 1968.

[20]Mexican-Americans constitute 18% of federal employees in grade levels G.S. 1-4 but only 2.3% of G.S. 12-18. For the Postal Service Mexican-Americans accounted for 11.3% of the low paying P. F. S. grades 1-4 but only 1.4% of the P. F. S. grades 12-20. (BI-17-143, at 24.)

[21]At trial reference was made to a 28 contiguous census tract area which in 1960 amounted to over 210,000 persons or about 30% of the Bexar County population and was almost 79% Mexican-American and 4% Negro. (Record at 524, ll. 6-15.) See especially Exhibits BI-1-143 and BI-2-143 for a map delineating this area in orange.

out Texas as "The West Side," included 73.04% of the Bexar County families with median income under $5,000.00 as contrasted with only 2.18% of those with median income over $25,000.00. (Record at 525, ll. 1-6.) Although it contained 29.55% of the county work force, 46.33% of Bexar County's unemployed resided there. (Record at 525, ll. 17-20.)

In the area of health, the evidence indicated that Mexican-Americans were much more likely than Anglos to suffer from diseases such as pneumonia, diabetes, and the various crippling child diseases. (Record at 491, ll. 3-8.) Indeed, the *Barrio* area of San Antonio contained almost 60% of the total Bexar County dwelling units lacking some or all plumbing facilities. (Record at 526, ll. 19-25.) By the same token the housing in the *Barrio* is generally dilapidated, unsafe and overcrowded.[22]

In the area of education, the trial court found that Mexican-American children face an "often insurmountable disorientation" due to the fact that they are reared in a subculture in which Spanish is the primary language. (A.Jur.S. 49A.) In a large percentage of Mexican-American homes, English is used "only as a second language when necessary." (Exhibit BI-12-143 at 66.)

The cultural background, including the use of Spanish as the vernacular language, of Mexican-American children has affected adversely their school attendance and performance as well.[23] For example, while the

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[22]The evidence showed that "only 60% of the Mexican-Americans in San Antonio lived in what federal agencies consider safe and sound housing." (Record at 490, ll. 11-12) and that the average value of the housing in the *Barrio* is considerably less than the Bexar County averages. (Record at 524, ll. 16-23, 527, ll. 1-7.)

[23]The United States Civil Rights Commission studies indicate that Texas has the poorest record of any of the southwest-

Barrio in San Antonio comprises only 30.82% of the population of Bexar County, 65.43% of the persons in Bexar County who have never attended school live there. (Record at 525, ll. 10-14.) This problem is further illustrated by the *Barrio* where two of the county's 19 school districts (three of which are in military installations) account for 74% of the county drop out rate.[34] (Record at 492, ll. 23-25; 493, ll. 1-4.)

Outright segregation of Mexican-American children in Texas schools is still another manifestation of the group's serious educational problems.[35] And again the

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ern states in holding Mexican-Americans in school. Before the completion of the 12th grade, 47% of Mexican-American pupils have left school. (Exhibit BI-16-143 at 17.) The likelihood that a Mexican-American will drop out of school is 3.2 times that of an Anglo as compared to the Negro who is 2.4 times more likely than an Anglo not to finish school. (Exhibit BI-16-143, at 20.) Expressed in other terms, only 53% of Mexican-Americans and 64% of the Negroes who enter the first grade graduate from high school. (Exhibit BI-16-143 at 31.)

In the area of reading achievement, the Commission report demonstrated that in the 4th grade, 52% of all Mexican-American students were deficient as compared to 21% of the Anglos and that by the 8th grade, of the Mexican-Americans remaining in school, three-fourths were found below average and 50% of those were more than 2 years below grade level. (Exhibit BI-16-153 at 31.) The study concluded that, of the Mexican-Americans who complete high school, 44% "suffer severe reading retardation." (Exhibit BI-16-143 at 34.)

In the corresponding area of grade repetition, 22% of the Mexican-Americans and 21% of the Negroes in Texas are required to repeat the first grade as contrasted with only 7% of the Anglo students. (Exhibit BI-16-143 at 36.) Indeed, by the 8th grade 16.5% of Mexican-Americans and 8% of the Negro pupils are two or more years over age. (BI-16-143 at 36.)

[34]One of these school districts, Edgewood Independent School District, was before this court this term in *San Antonio Ind. School Dist. v. Rodriguez*, Cause No. 71-1332 which involved the area of school finance.

[35]The United States Civil Rights Commission Report entitled *Ethnic Isolation of Mexican-Americans in the Public Schools of the Southwest, Report I*, in evidence as Exhibit BI-15-143, indicates that in Texas 70% of all Mexican-American elementary students attend predominately Mexican-American

pattern of school segregation—or, put differently, ethnic isolation—is pronounced in Bexar County.[36]

Mexican-Americans in Bexar County and in Texas generally have suffered from legal and other barriers, customs or practices dealing with the purchase, sale and financing of real estate which had the result of confining them to areas such as the San Antonio West Side.[37] Restrictive covenants in real estate transactions were one widespread means used to accomplish this. Texas courts enforced such covenants until they were outlawed in *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836 (1948) which was followed in *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App.—San Antonio, 1948, writ ref'd, n.r.e.) One example of such a covenant against Mexican-Americans and Negroes which was engrafted in a deed to two tracts of land in Bexar County and which jointly involved 287 acres is Exhibit BI-20-143 at 3 which was admitted in evidence.

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schools and that approximately two-thirds of school age Mexican-Americans are in but 16% of the State's schools. (Exhibit BI-15-143 at 28.) Indeed, of all the southwestern states, this pattern of segregation is the most pronounced in Texas (Exhibit BI-15-143 at 28) since three-fourths of all Mexican-American pupils in the southwestern states who attend predominantly Mexican-American districts live in Texas. (Exhibit BI-15-143 at 32.)

[36] *The United States Civil Rights Commission Report I* found that the Mexican-American pupils in five of Bexar County's nineteen school districts represent nearly 30% of all Mexican-American students who attend predominantly Mexican-American schools in Texas. In other words five Bexar County school districts represent 30% of all educationally segregated Mexican-Americans in Texas. There are 1,231 school districts in Texas. (BI-15-143 at 25.) Richard Avena of the United States Civil Rights Commission testified that not only are the Bexar County school districts segregated, but within the districts segregation exists on a school by school basis. (Record at 491, ll. 15-25.)

[37] See Record at 1006-1009 for evidence relating to the effect on Mexican-American residential segregation of FHA mortgage financing practices.

(Record at 1015, ll. 8-12.) This land was conveyed for residential subdivision purposes in 1949 by an individual who was Mayor of San Antonio for six years.[28] (Record at 1014, ll. 24-25; 1015, ll. 1-6.) It is noteworthy that this covenant was used some twenty months after *Shelley v. Kraemer, supra*, was decided.

As in the case of the Negroes, the Mexican-Americans politically have been affected adversely by the poll tax, *United States v. Texas*, 252 F.Supp. 234, 245 (W.D. Tex. 1966), *aff'd* 384 U.S. 155, 86 S. Ct. 1383 (1966); the excessive filing fees, *Carter v. Dies*, 321 F.Supp. 1358 (N.D. Tex. 1970); the annual registration requirement, *Beare v. Smith*, 321 F.Supp. 1100 (S.D. Tex. 1971); and the residency requirement of six months prior to an election when one moved from county to county, *Whatley v. Clark*, ... F.Supp. ..... (E.D. Tex. 1972). These are some of the basic manifestations in the Texas electoral system of what was referred by Appellees' expert as the "legacy of slavery, racism, and prejudice," (Record at 290, ll. 6-7.) Since Mexican-Americans are generally found to be poorer than Anglos, the poll tax and the filing fee discriminated against them as much as against Negroes. Since the Mexican-Americans are generally found to have lower educational achievement and a different vernacular language and since they comprise 95% of the Texas migrant agricultural workers, the annual voter registration requirement and the resi-

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[28] The actual covenant reads:
"(7) No lot, tract, or re-subdivision thereof, shall ever be sold, leased, demised or conveyed by deed, lease, gift or otherwise to Mexican, Negroes, or persons of either Latin American or African descent, nor shall any lot, tract or re-subdivision thereof ever be used or occupied by Mexicans, Negroes, or persons of either Latin American or African descent except as household servants."

dency requirement imposed on them even more serious handicaps for participation in the electoral process than they did on the Negroes. Additionally, because of non-attendance in school, drop out rates and other educational handicaps they were particularly singled out by the Texas Election Code provisions allowing election judges to aid blind and physically disabled voters in marking their ballots but denying the same aid to illiterate voters until these provisions were set aside as unconstitutional in *Garza v. Smith*, 450 F. 2d. 790 (5th Cir. 1971).

The trial court also had before it evidence of poor performance by Bexar County Mexican-Americans in previous elections of State Representatives from Bexar County. In the period of 1880 to 1970 no more than 27 Mexican-Americans ran for the State legislature, (Record at 530, ll. 9-15.) Of that number, only five were elected—one in 1890 and four since 1961, (Record at 529, ll. 17-25.) Furthermore, in the years 1960-1970, Mexican-Americans entered only 22 of the 133 races for these positions in the Democratic Party Primary. (Record at 654, ll. 3-14.)

Specifically with reference to the *Barrio* area, only four persons offered themselves as candidates from 1960-1970. (Record at 533, ll. 6-10.) Of these, only two were Mexican-Americans, one was a Negro and one was an Anglo. (Record at 533, ll. 10-12.)

Based upon a study of all the elections for the Texas House in Bexar County from 1880 to 1970 several conclusions were received in evidence by the district court and not contested by the State. First, Mexican-Americans are much more likely to vote for Mexican-Americans than for Anglos. (Record at 534, ll. 18-25; 535, ll. 1-20.) Next, when Mexican-Americans run against Mexican-Americans, the vote tends to split between

them. Record at 535, ll. 20-25; 536, ll. 1-5.) Third, where there are no Mexican-Americans in a race, the Mexican-Americans tend to vote for the most popular Democrat—usually the winner. (Record at 536, ll. 7-10.) Fourth, the Republican Party is clearly a minority party.[29] Another conclusion, likewise uncontroverted by the State, resulted from a comparison of how predominantly Anglo precincts vote in contrast to the *Barrio* area. This study indicated that Anglos tend to vote in the neighborhood of 6-1 to 9-1 against Mexican-Americans. (Record at 769, ll. 15-25; 770, ll. 1-25; 771, ll. 1-15.)

It is thus clear that economically and educationally Mexican-Americans have in the past and continue to the present to be greatly disadvantaged in terms of competing with their fellow citizens. It was specifically the overall context of the educational-langauge problems encountered by Mexican-Americans that led the trial court to note that "[t]here is no aspect of human endeavor, in general and of American life in particular, in which the ability to read, write and understand a language is more important than politics." (A.Jur.S. 50A.) The trial court drew certain inferences from the minimal impact of Mexican-Americans on the elections for the Texas House from Bexar Coun-

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[29]The study of Bexar County elections disclosed that since Reconstruction no Republican has ever been elected to the Texas House from Bexar County and that in 1970 only one Republican offered himself for election and nine Democrats were unopposed in the general election. The sole Republican candidate received only 29,240 votes as opposed to 88,525 for his Democratic opponent. In 1968, five Republicans ran in contested races and five Democrats were unopposed in the general election. Again, no Republican was elected. In 1966, only three Republicans ran for ten House places. Generally, Republicans tend to lose in ratios running from 3-1 to 3-2. The largest vote ever received by a Republican in a Republican Primary election was 5,016 votes. (Record at 542, ll. 23-25; 543; 544; 545, ll. 1-9.)

ty. First of all the court reasoned that the political participation is affected by "a cultural incompatibility which has been fostered by a deficient educational system." (A.Jur.S. 50A.) The ability to read and write effectively and possession of minimal educational attainment are necessary for any participation in the political process.

The Court next found:

> This cultural and language impediment, conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary. (A.Jur.S. 51A.)

Indeed, on direct examination, the State's own witness, Roy Barrera, a former Secretary of State (the State's Chief election officer), recognized the effects of past and *continuing* discrimination against Mexican-Americans in reducing their participation in the political process.

> A. I believe that one of our major problems in San Antonio, as in other communities, has been a lack of participation by our people. However, of course, this has been aided and abetted, to a great extent, and contributed to by other factors which I would certainly cite; among them being discriminatory practices that have been heretofore inherent in our election processes, yes.
>
> Q. Are those factors presently being removed?
>
> A. I would say that to a great extent, they have been and are being removed.
> (Record at 559, ll. 14-24.)

Under cross-examination he conceded that some of the adverse factors removed or in the process of being

removed are the poll tax, the filing fee and the requirement of annual voter registration and that in every case the change was brought about as a result of litigation in the federal courts which these requirements to be unconstitutional. (Record at 593, ll. 8-25; 594, ll. 1-3.)

C. *The Distinction Between Texas and Indiana*

At the trial and in this Court the State relies on *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, (1971), to assert that Appellees' claims are unfounded. The State disagrees with the trial court's construction and interpretation of said case and with the conclusions which drew from its understanding of the law as expounded by this Court in *Whitcomb*. Appellees submit that the trial court correctly analyzed the case and applied its teaching with great care to the Texas situation.

In Marion County, Indiana, which provided the factual setting for *Whitcomb*, there is a substantial Negro minority, a large percentage of whom live in a ghetto. Appellees offered expert testimony at the trial from Dr. Clifton E. McClesky of The University of Texas who testified as follows on the basis of a comparative study of minority groups and their access to the political processes in Texas and Indiana:

> A. Yes, sir. It seems to me that the differences there are of four sorts. The State of Indiana simply does not have the legacy of segregation, slavery, racism and so on that this state has. Another difference is social in nature. Minority groups in the State of Indiana, generally speaking, and particularly Black minorities, have higher socioeconomic status and are thus better able to organize themselves to mobilize themselves to defend their interest and to seek effective representation. A third factor for it seems to me is the difference in

the rules of the game. In the State of Indiana there is no double primary, there is no majority requirement and there is no place system in legislative contest; that does make a difference.

JUDGE JUSTICE: There is no what?

A. No place system. The top five or ten or whatever men in a given district will win regardless of whether there is any—Well, there is no place designation. The fourth factor, it seems to me, is the political context. Indiana is a competitive state with pervasive and continuous party competition at almost every level.

(Record at 287, ll. 10-25; 288, ll. 1-7.)

McClesky's testimony was in the context of the Negro minority in Dallas County though his conclusions, obviously, apply to the Mexican-American minority as well. As relates to the Mexican-American and Bexar County, Dr. Charles L. Cotrell of St. Mary's University in San Antonio corroborated McClesky and expanded on the issue. He was not even cross-examined by the State; hence, his expert testimony on the record stands uncontradicted.[30]

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[30]Dr. Cotrell testified (Record at 652, ll. 7-25; 654; 655, ll. 1-15):

A. The question of representational schemes, the question of ballot schemes and the question of general election schemes has long been a subject for the study of political scientists.

Beginning with political scientist Maurice Duverger in the '50's and then continued in the 60's by political scientists such as V. O. Key, I think one could reach conclusions such as these about election schemes, representational schemes and so on.

Duverger concluded after a very exhaustive study—his work was substantiated by V. O. Key, and I think that there is data to substantiate this in Bexar County—that the plurality system encourages both recruitment and election of more diverse factions than does the majority system as a ballot system.

Based on this testimony, the trial court found:

In addition, unlike the plurality system in Indiana, Texas has a strict "majority" requirement in the primary. Virtually unknown outside the South, the majority requirement has not escaped considerable criticism on both Fourteenth and Fifteenth

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Duverger found that, in fact, the two ballot system, that is, that a majority ballot with a runoff, was the kind of system which least encourages both the recruitment—and I think that is an important issue here—the recruitment and the election of candidates to office. In Bexar County I believe that that would be borne out by this fact. From the period 1960 to 1970, in the recruitment stage, and I hope that the Court would consider this a vital part of the electoral process—the recruitment of candidates—only twenty-two of a hundred and thirty-three, in a hundred and thirty-three races in a democratic primary, only twenty-two of those were entered by Mexican-Americans at the state legislative level in the Democratic primary, bearing out the Key-Duverger thesis showing that certain kinds of representational systems and so on discriminate against diverse factions.

Q. Of course, actually we do not have a plurality system in Texas, do we?

A. That's true.

Q. We have the system whereby a candidate has to announce for a place, say in the party primary, and if he does not get a majority vote in the first primary he has to go into a runoff with the next highest candidate. Do you have any views as to how the control of a political party operates under both of these systems that we are talking about, plurality versus majority vote—party control?

A. Well, if you are—your question relates to Bexar County and to Texas. Of course our—there is no real party control in the state in Bexar County, at least, in the state legislative races. There is no control concerning the recruitment of candidates and so on.

Q. For example, is there any formalized procedure whereby the Democratic Party in Bexar County would go about slating candidates for a Democratic Party primary election?

A. Your question concerns party control. No. I would describe the process of recruitment or selection of candidates in Bexar County as informal and almost anarchic.

Amendment grounds. See *Evers v. State Board of Election Commissioners*, S.D. Miss., 1971, 327 F. Supp. 640; *Boineau v. Thornton*, E.D.S.C. 1964, 235 F.Supp. 175. Whatever its constitutional status, it is clear that the majority system tends to strengthen the majority's ability to submerge a political or racial minority in a multi-member district. (A.Jur.S. at 38A.)

Appellees submit that the most obvious difference between the political systems in Texas and Indiana is that in Indiana, as found by this Court in *Whitcomb*, there exists a viable two party system where minorities are able to operate along with other interest groups such as liberals, conservatives, unions, religious groups and the university community in combining to form coalitions and thus are able to influence elections. In Texas, however, there exists a one party system, at least on the county level and certainly in Bexar County. For example, the evidence showed that no Republican had been elected to the Texas House of Representatives to represent Bexar County since reconstruction. Thus, for the position of State Representative, the Democratic Party nomination has always been tantamount to election. This fact places considerable importance on the process of nomination of candidates.

In Indiana, this Court found that there existed slating conventions where party nominees were chosen to run in party primary elections, and it appeared that these choices were usually successful. *Whitcomb v. Chavis*, 403 U.S. 124, 150-152, 91 S. Ct. 1858, 1872-73 (1971). Thus, in Indiana well disciplined minorities are able to and do succeed in placing many of their own candidates on the ballot. If they lose in the general election, as this Court found in *Whitcomb*, it is because their party loses.

The Texas situation contrasts sharply with this.

First of all, with reference to Bexar County, although there is a one party system, that party does not control the nomination process, including the recruitment of candidates. In fact its nomination process was described by Dr. Cotrell as "almost anarchic." (Record at 655, ll. 9-15.) Since members of the State House are elected under the majority place system, a prospective candidate must first overcome the hurdles of the Democratic Party primaries. If he fails to obtain a majority in the first primary, he must then face a runoff election. And he does not have the benefit of party endorsement or support as he enters the primaries for there is no convention or other device to "slate" party candidates. As a matter of course, several candidates usually offer themselves for each place. This often results in no single candidate receiving a majority of the votes requiring a "runoff" election between the two candidates with the highest vote in the first primary. Thus, generally when a candidate favored by a minority enters a primary election and wins the first round, he is almost invariably forced into a runoff and defeated when all opposing forces combine and join against him.

As already stated, Dr. McClesky analyzed the electoral system in Texas as contrasted with Indiana. He concluded that for both theoretical and historical reasons the Texas system tends to minimize the opportunities of minorities to participate in the political process. (Record at 288, ll. 10-25; 289; 290; 291, ll. 1-2.) As also stated, Dr. Cotrell examined the very small numbers of Mexican-Americans who run for election and concluded that the Texas electoral system discourages minority recruitment (Record at 653, ll. 22-25) and this "discriminates against diverse factions." (Record at 654, ll. 3-15.)[21]

[21]The State at note 42 in its brief refers to the testimony of

D. *The Cost Factor*

Of course, the entire situation is compounded by the

Roy Barrera to show that Mexican-Americans have been elected to public office in Bexar County. But a close analysis of his testimony in most instances demonstrates circumstances which are uniquely different from those governing election to the Texas House. Barrera on direct examination made reference to Congressman Henry B. Gonzales (Record at 557, l. 4), to State Senator Joe Bernal (Record at 556, l. 3), to County Commissioner Albert Pena (Record at 556, l. 18), and to Justices of the Peace James Gutierrez and Mike Hernandez. (Record at 554, ll. 22-23.) Under cross examination, however, Barrera conceded that all of these had been elected from single-member districts. (Record at 608, l. 24; 609, ll. 1-5.) Further he testified that Bernal (Record at 575, l. 23), Pena (Record at 579, ll. 16-17) and Gutierrez and Hernandez (Record at 607, ll. 4-25; 608, ll. 2-6) all were elected from predominantly Mexican-American districts.

Barrera also testified on direct that County Court at Law No. 2 Judge H. F. Garcia, District Court Judge John Benavides and Justice Carlos Cadena of the Fourth Court of Civil Appeals all were initially appointed to the bench and thereafter were re-elected *without opposition*. (Record at 555, ll. 3-16.) One Mexican-American, however, who ran in contested races twice for district judge was defeated both times even though he did not run an "ethnic-type campaign." (Record at 574, l. 24; 575, ll. 1-9.)

The only Mexican-American member of the Bexar County House delegation at time of trial had the fortitudinous circumstance for political purposes of having a name that could be used interchangeably in English and Spanish. (Record at 613, ll. 16-19; 579, ll. 3-12.)

Barrera, on direct, testified that Mexican-Americans, including himself, have been elected to the Board of the Edgewood Independent School District (Record at 555, ll. 21-23) but on cross conceded that said district is almost 100% Mexican-American (Record at 569, ll. 9-14.)

Barrera further testified that in 1971 three Mexican-Americans and one Negro had been elected to the nine-member San Antonio City Council, but Gilbert Garza, another witness for the State, testified they had been endorsed by the Good Government League which won all nine seats (Record at 619, ll, 15-18) as a result of a "strong effort" to rid itself of two opposition councilmen (Record at 628, ll. 6-9), including the expenditure of $152,425.84 in two elections (Record at 628, ll. 18-25; 629, ll. 1-11) in contrast to a total of $6,502.60 spent by several candidates from the *Barrio*, (Record at 629, ll. 13-22.)

excessive costs of filing and running in two hard fought primary elections in counties of the size of Bexar and Dallas. It was estimated that the cost of a campaign for a legislative seat in Dallas County could be as much as $125,000.00 while the two year term would pay only $4,800 per year. (Record at 788, ll. 12-25; 789, ll. 1-3.) A specific study done with respect to the cost of running an election in Bexar County demonstrates that the average winner of a contested primary election spent over three times as much as the average loser, even though the winner was often the incumbent. (Record at 536, l. 25; 537, ll. 1-17; 538, ll. 1-21.)

The excessive costs of running in primary, runoff and general elections is higher in multi-member as opposed to single-member districts. Since the data introduced at trial showed that Mexican-Americans and Negroes had considerably lower incomes, it is simple to see how the cost factor influences a member of a minority group's entry into politics and magnifies the effect of the multi-member district's discouragement of candidate recruitment. (Record at 657, ll. 17-25; 658, ll. 1-3.) As the trial court stated, citing *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968), "discriminations within the law that affect political candidates correspondingly affect the right to vote and the right to associate politically." (A.Jur.S. 27A.)

Since it is clearly established that it costs substantially more to run in the multi-member districts in Dallas and Bexar Counties than in the single-member districts of Harris County, the threshold question becomes, as stated by the trial court, "Has Texas demonstrated a compelling state interest for treating the candidates and political associations of Houston in a way different than it treats the candidates and political associations of other [similar] metropolitan areas of Texas?" (A.Jur.S. 31A.) There appears to be no

question that for all practical purposes the three metropolitan areas are similar in all respects. The only explanation offered for the differing treatment was that the people in Dallas and Bexar wanted it that way. Yet, as the trial court found, there was serious doubts as to where the Board got this impression. (A.Jur.S. 31A.) Indeed, even if the use of public opinion was sufficient to justify such substantive inequality of treatment, the state must at least thoroughly investigate and document the "wishes of the people." (A.Jur.S. 31A.) However, the fact of the matter is that public opinion cannot justify such distinctions. *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 84 S. Ct. 1459 (1964).

E. *Legislative Performance*

The State in its brief alleges that the trial court made no finding regarding recurring poor performance by the Bexar County legislative delegation with respect to the *Barrio*; no showing of what the *Barrio's* interests were in particular legislative situations; and nothing to show that the outcome would have been different had said delegation been chosen from single-member districts. It equates the "right to register and vote" with "equality of opportunity to participate in the political process." Brief for Appellants at 35-36. It further refers to a stipulation of the parties that as to Mexican-Americans "there had been no denial in Texas of the right to register and vote since 1961, and the record contains no evidence to the contrary."

Appellees again say this is specious reasoning and a clear misstatement of the record. To begin with the stipulation referred to was restricted to *the individual Mexican-American plaintiffs in the lawsuit.* (Pre-trial Order in Civil Actions A-71-CA-143 and A-71-CA-145, at 3, Stipulation No. 7.) Furthermore, a voter may

have the right to register and vote and still be denied an opportunity to compete *as a candidate* in the political process or to associate politically to further the election of candidates of his choice. Also, Appellees have already shown that the opportunity of Mexican-Americans *as voters* were affected by the poll tax, the excessive filing fees, the annual registration requirement, the six-months residency requirement, the majority place system in Texas as it operates in multi-member districts and the cost factor in campaigning in large multi-member districts.

As to the issue of recurring poor performance, Appellees hold that this cannot be a constitutional standard upon which depends a determination of whether multi-member districts dilute or cancel out the voting strength of minority elements in the population. As this Court knows, this is a subjective measure when applied to determine how and why a specific legislator acted on a specific legislative measure or issue. The interplay of legislative compromise is such that a standard of this nature would be utterly impossible to apply. It certainly is one in which Appellees did not rely at trial for they feel strongly that such a standard is not to be derived from this Court's opinion in *Whitcomb*. The pertinent language thereof was cited in the trial court opinion as follows:

> Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had *less opportunity* than did Marion County residents *to participate* in the political process and to elect legislators of their choice. 403 U.S. at 149. (A.Jur.S. 52A.) (Emphasis added.)

It is the opportunity to participate that is important; the opportunity to elect a legislator of one's

choice—or, once elected, to remove him at the next election if his constituency is so disposed. It is this lack of opportunity to participate that this case is about. It strains the imagination to believe the conditions of Mexican-Americans, as depicted by the record in this case, would remain so at time of trial had their legislative representatives been more concerned with the welfare of this group. Appellees readily concede that single-member districts are no panacea, no millennium. They are no guarantee of satisfactory legislative representation—they merely give an opportunity to participate, to elect or to defeat, and to thereby make representation more responsive.

On this point, Appellees further would cite the trial court opinion wherein the court notes:

> An Anglo member of the House of Representatives from Bexar County was unable to identify any piece of legislation sponsored by any member of the Bexar County delegation at the last session of the Legislature to relieve or remedy the adverse conditions extant in the West Side. (A.Jur.S. 52A.)

Appellees, if necessary, say that the history of Texas and Bexar County so fully detailed herein, the conditions of the Mexican-Americans as they presently are and the spate of federal court decisions, many of very recent vintage, are the best standard by which to gauge the performance of the Bexar County legislative delegation.

In closing Appellees believe it is noteworthy to refer to the results of the 1972 elections. A total of 53 candidates entered the Democratic and Republican Primaries held under the court-imposed plan for single-member legislative districts in Bexar County. (Certification, Democratic and Republican Primary Elections held May 6, 1972.) In the November, 1972,

General Election four Mexican-Americans, one Negro and two Republicans were elected to seven of Bexar County's eleven House seats. (Certification of Election Returns, General Election held November 7, 1972.) At time of trial out of ten House members, nine were Anglo and one was Mexican-American. There were no Negroes or Republicans. (Exhibit DB-1-143.)

III.

THE DEVIATION IN THE BOARD PLAN FAILS TO MEET THE REQUIREMENTS OF ONE MAN, ONE VOTE

A. *The State's Assertions*

The State in its brief asserts that the Board plan has a total deviation from population of 9.9%, a deviation ratio of 1.1 to 1 and an average deviation of 1.82%. Brief for Appellants at 11. Given such facts, it argues that "further inquiry [by the courts] is not required . . . ." Brief for Appellants at 26. Appellees' brief heretofore in its discussion of irrationality, or the converse, use of a rational state policy consistently applied, as well as of the dilution of the voting strength of minority population groups—all this in the context of the entire Texas scene, including the historical basis for the present conditions of the minorities, the overall electoral system and other factors—has laid the perimeter in which the Board plan must be analyzed. These factors truly are the "circumstances" which determine what is "marginally permissible" in Texas. *Reynolds v. Sims*, 377 U.S. 533, 578, 84 S. Ct. 1362, 1390 (1964).

Put somewhat differently, the State asserts that "absolute mathematical equality is an impracticable standard which ill serves the goal of fair and effective representation for all citizens." Brief for Appellants

at 27. In footnote 19 keyed to said statement, it argues further that the State may aim for "equality as nearly as practicable" but a *de minimus* standard could be applied to the end product (such standard perforce including the 9.9% top to bottom deviation encompassed in the Board plan) which once met would shift the burden imposed by this Court in *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S. Ct. 1225 (1969). A burden of "*per se* illegality" as to the "trivial variances" referred to in said footnote would rest on those questioning a redistricting plan. It also asserts the plan under attack "contains an average deviation of only 1.82%. Brief for Appellants at 26. This is specious reasoning by which the State, in effect, seeks to take refuge in what would be a *de minimus*, total deviation of 9.9% resulting from an alleged good faith effort to maintain county integrity. It takes no statistician to conceive the inherent danger in a standard which allows no inquiry into a plan, such as the Board's plan, with a 1.82% average deviation but encompassing a 9.9% total top to bottom deviation. As here, proper inquiry into particularly egregious treatment given specific areas on an *ad hoc* basis, may well belie a rational State policy consistently applied.

B. *The Constitutional Standard*

The trial court's opinion discusses in detail the current state of the law as declared by this Court. (A.Jur. S. 9A-12A.) At page 12A it concludes:

> In any case, the percentages upheld and rejected in other cases are of little enlightment. The critical issue remains the same: Has the State justified any and all variances, however small, on the basis of a consistent, rational State policy?

Appellees submit that this is the proper standard and that adoption of a standard setting a *de minimus*

goal for which any State can strive, and certainly one encompassing a 9.9% total deviation, would merely open the floodgates of "subterfuge" and result in additional litigation.

C. *The Fallacies in the Standard Sought By the State*

The State takes refuge in what it would like to call a *de minimus* deviation of 9.9% resulting from an alleged good faith effort to maintain county integrity. Of course, as has been shown, if the Board did make such an effort, no rationale can be gleaned from the result—a crazy quilt arrangement of multi-member districts for all metropolitan areas except Harris County coupled with wholesale cutting of county lines. Thus, the only justification offered for the deviation which exists in the plan fails, and the State has attempted no other explanation as the trial court clearly found in its opinion. (A.Jur.S. 14A.) The fact of the matter is that while the 9.9% total deviation figure is barely within the range approved in *Abate v. Mundt*, 403 U.S. 182, 91 S. Ct. 1904 (1971), the State has not even attempted to make an explanation such as this Court heard in *Abate*.

Another side of the coin of deviation becomes apparent when one considers that in the light of the size of an ideal Texas legislative district a 9.9% deviation represents almost 7,400 persons. This number of persons is equal to 122% of the ideal North Dakota representative district of 6,056 persons before the district court in *Chapman and Stockman v. Meier*, ____ F. Supp. ____ (D.N.D. 1972, slip opinion, May 22, 1972), and it is 73% of the smallest district (10,086 persons) allowed by the district court for Nevada in *Stewart v. O'Callaghan*, 343 F.Supp. 1080, 1081 (D.Nev. 1972). Thus, as a matter of constitutional precedent, which once established by this Court is applicable nationwide,

what is sauce for the goose is not necessarily sauce for the gander. It illustrates this Court's wisdom in refusing to set a *de minimus* goal to be met by State authorities in devising redistricting plans and in refusing to close off inquiry into the justification for any plan departing from substantial mathematical equality.

D. *Total Deviation is 29.3% not 9.9%*

The 9.9% total deviation alleged by the State, Appellees submit, is incorrect. The actual deviation is 29.3%.

To arrive at 9.9% the Board handled the multi-member districts, in particular Dallas and Bexar Counties, by spreading the actual deviation among the number of representative positions which their populations merited. Thus, the Dallas County population of 1,327,321 persons is 16,289 persons short of 18 ideal districts (74,645×18=1,343,610). The State's method of computing the deviation averaged the 16,289 people among the 18 districts and resulted, according to its figures, in a 1.2% deviation.[22] The Appellees contended at trial, and reiterate their position here, that this computation is both confusing and incorrect. Rather, the entire deviation of 16,289 persons has to be judged against a single ideal district of 74,645. Viewed in this context, the Dallas deviation is 21.67% below the norm. A similar handling of the Bexar County multi-member district results in a 7.6% deviation above the norm. These two deviations, then, represent a total deviation of close to 29.3% rather than one of 9.9%.

It is submitted that this analysis of Appellees is the

[22]In its opinion at A.Jur.S. 13A, n. 5, the trial court criticized the State method as corresponding to the method of computing deviations in flotorial districts which was condemned in *Kilgarlin v. Martin*, 252 F. Supp. 404 (S.D. Tex., 1966.)

most correct expression of the actual operation of a multi-member district in diluting or minimizing a person's vote. When a multi-member district voter enters the polling place, he casts votes for the various places on the ballot. In Dallas County, for example, in each electoral place there is a deficiency of 16,289 persons. Thus, the weight of a vote of a person in Dallas County is increased by the fact that his district is 16,289 persons short. By the same token, the force and impact of a Bexar County multi-member district voter is minimized since there are 5,599 additional voters for each place in which a vote is cast. The effect on each voter in these two districts is the same as if he had lived in a single member district which was either 16,289 persons short of ideal or 5,599 persons in excess of ideal.

Furthermore, it demonstrates the capacity of a multi-member district to submerge voting strength, *Whitcomb v. Chavis*, 403 U.S., 124, 91 S. Ct. 1858 (1971). If the State's method is allowed, a multi-member district the size of Dallas County or Bexar County could absorb or give up an entire legislative district without violating the 9.9% total deviation. Thus, Bexar County could have received 12 rather than 11 representatives with only a 7.52% deviation, and the size of the Dallas delegation to the State legislature could have been reduced from 18 to 17 with an excess deviation of only 4.6%. The average Dallas district would then be 78,078 which is smaller than District 45 (78,090), District 3 (78,943) and District 38 (78,897). To endorse this method of computation is to open another floodgate.

The absurd conclusions which are reached by the foregoing computational excursion point out the problem inherent in the use of a Texas sized multi-member district in conjunction with the requirement of running at large for a given place on the ballot and re-

quiring a runoff election when no candidate in a given place obtains a majority of the vote in the first go-round. As elsewhere stated, this is a far cry from the plurality system of election found in Indiana.

IV.

CONCLUDING ARGUMENT

This Court has recognized that a long history of discrimination has a lingering effect that transforms a procedure or system which appears neutral on its face into one which is discriminatory. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971). In these situations, a state must at least refrain from taking actions which aggravate the discriminatory effect. Since *Whitcomb v. Chavis, supra*, at least two district courts have held a legacy of slavery, racism and prejudice to render multi-member districts discriminatory. *Bussie v. Governor of Louisiana*, 333 F. Supp. 452 (E.D. La. 1971), *aff'd. as to invalidity of multi-member districts*, 457 F.2d 796 (5th Cir. 1971); *Sims v. Amos*, 336 F.Supp. 924 (M.D. Ala. 1972). This Court has distinguished *Whitcomb* on identical grounds recently. *Taylor v. McKeithen*, 407 U.S. 191 at n.3, 92 S. Ct. 1980, 1982 (1972). The evidence before the trial court included not only the history of discrimination, but it was supplemented by evidence of the present workings of the Texas political system.

The State, in its brief, says the broad question presented by this case is whether legislators or data processors are to be entrusted with the job of redistricting. Its representatives thirst for some soothing respite in the form of an exact definition of *de minimus* deviation. They hunger for the days of old when no one was allowed to question their actions. Like Ulysses, they hope that this Court will be attracted to the Sirens of Simplicity. But *de minimus* is not some unicorn on a

mythological field; there is no golden fleece; and this is not simply a case about the right to register and vote. This case is about the political reality of Texas. The plaintiffs below were not "certain political groups." Brief for Appellants at 3. They were the people of Texas demanding an equal voice in the election of their representatives. They are the people of Texas asking for participation in the political process "as a matter of right, not as a function of grace." (A.Jur.S. 41A.)

CONCLUSION

For the foregoing reasons, Appellees respectfully pray that the judgment of the court below be, in all respects, affirmed. Appellees further pray for their costs, including attorneys' fees, in this behalf expended.

Respectfully submitted,
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By :.....

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that three copies of the foregoing Brief for Appellees have this 9th day of February, 1973, been served upon each counsel of record for Appellants in accordance with the Rules of this Court, by depositing same in the United States Mail, with certified mail postage prepaid, addressed to said counsel at their post office addresses.

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ED IDAR, JR.